Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, 1993

THE NATIONALIST MOVEMENT,
Petitioner

vs.

FORSYTH COUNTY, GEORGIA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD BARRETT
(Counsel of Record)
PO Box 2050
Learned MS 39154
(601) 885-2288

Attorney for Petitioner

31 pp

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QUESTIONS PRESENTED

1. Whether a denial of attorney fees in an important civil rights case so deviates from accepted norms of judicial procedure as to warrant imposition of the supervisory powers of this Court?

2. Whether there is sufficient conflict between the Eleventh Circuit, in the denial of fees without a finding of "special circumstances" which would render a fees' award unjust, and other Circuits, which require such a finding, to justify reversing the denial of fees here, given public policy considerations, the *Newman v. Piggie Park Enterprises, Inc.* rationale of this Court and the legislative history of 42 USC §1988?

3. Is clarification needed in directing the filing of motions for fees under 42 USC §1988, given procedural considerations where motions are filed in various courts, for various amounts and under varying circumstances, but also given constitutional dimensions and the likely impact upon the private attorney general rationale, by which civil rights' cases are so often and necessarily brought?

PARTIES BELOW

City of Cumming, Georgia

Forsyth County, Georgia

Forsyth County Board of Education

The Nationalist Movement

CASES BELOW

The original case was *The Nationalist Movement v. City of Cumming, Georgia, Forsyth County, Georgia, and Forsyth County Board of Education,* C.A. File No. 2:89-CV-06-WCO (N.D.Ga. 1989). The original appeal below was *The Nationalist Movement v. City of Cumming et al,* No. 89-8417 (11th Cir. 1989). The instant case is *The Nationalist Movement v. City of Cumming, Georgia et al,* C.A. File No. 2:91-cv-89-6-WCO (N.D.Ga.1993). The appeal below is *The Nationalist Movement v. City of Cumming, Georgia, Forsyth County, Georgia, and Forsyth County Board of Education,* No. 93-8466 (11th Cir. 1993).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, The Nationalist Movement, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINION BELOW

The ruling of the United States Court of Appeals for the Eleventh Circuit from which certiorari is sought is contained in the case styled *The Nationalist Movement, a Mississippi non-profit corporation incorporated in Georgia, v. City of Cumming, Georgia, Forsyth County, Georgia and Forsyth County Board of Education,* at Appendix A, dated November

29, 1993, which denied attorney fees for Petitioner, affirming the decision of the United States District Court for the Northern District of Georgia, Gainesville Division, in the case styled *Nationalist Movement v. City of Cumming, Georgia et al,* at Appendix B, dated March 24, 1993.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.1, Petitioner states that it is a Mississippi non-profit corporation, having no parent corporation. All subsidiaries or affiliates are wholly part of Petitioner.

RELEVANT STATUTORY PROVISION

42 USC §1988 which reads:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

SUMMARY OF THE ARGUMENT

The on-again-off-again denial of attorney fees in this important civil rights' case, which struck down "nominal" user fees for free speech activities in the traditional public forum, may send confusing or conflicting signals to those wishing to

invoke the time-honored "private attorney general" procedure of challenging unconstitutional denial of the rights of American citizens by public officials.

This Court has made a strong commitment to the awarding of attorney fees to prevailing civil rights' litigants of some twenty-five years standing. The legislative history of 42 USC §1988, together with public policy considerations, underscore the need to continue this commitment, given First and Fourteenth Amendment implications, as well.

There may have been procedural conflicts and misunderstandings of an Order by this Court denying fees which may give this Court an opportunity at this time to stress constitutional and justice considerations over procedural considerations by remanding the case to the Court of Appeals for further proceedings to award fees in some manner, possibly for matters leading up to this Court or otherwise, as the Court deems just and right. In so doing, the Court may undergird its commitment to the principle that the kind of free speech does not prohibit exercise of the First Amendment and, here, the character of the speech does not prevent the full and fair enforcement of 42 USC §1988.

STATEMENT OF THE CASE

Petitioner, a non-profit charitable and educational corporation, has prevailed on the merits of this case, *Forsyth County, Georgia v. The Nationalist Movement,* ___ U.S. ___, 112 S.Ct. 2395 (1992), which invalidated user fees for exercise of First Amendment rights in the traditional public forum of the courthouse square.

As the case made its way through the courts, Petitioner filed for attorney fees against Respondent, pursuant to 42 USC §1988, in the Court of Appeals, on October 11, 1990, July 11, 1991 and August 12, 1992, in this Court, on June 25, 1992 and

July 22, 1992, and in the District Court on August 12, 1992, see *e.g.* Order, Appendix B, p. 17, n. 1. The requests treated services rendered up until the respective dates of each filing, for the courts which had, up until that time, entertained the proceedings.

The Court of Appeals did not act on the request before it (which covered the District Court and Court of Appeals) while the case was pending here; however, this Court, after disposition here, issued an order on October 5, 1992 which stated that the motion here for attorney fees was denied. Thereafter, on February 24, 1993, the Court of Appeals issued a mandate to the District Court to determine a reasonable attorney fee. An objection filed by Respondent was overruled by the Court of Appeals on March 16, 1993.

On March 24, 1993, the District Court ruled that it perceived a conflict between the order of this Court and the Court of Appeals, holding that Petitioner was entitled to no attorney fees from Respondent on its previous motions. Petitioner's request for attorney fees from Respondent up until the final disposition of the case was, also, denied. On November 29, 1993, the Court of Appeals affirmed the District Court, without opinion. The case is timely brought before this Court.

REASONS FOR GRANTING THE PETITION

PROPOSITION I

IN DENYING ATTORNEY FEES TO THE PREVAILING PARTY IN AN IMPORTANT CIVIL RIGHTS' CASE, THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR HAS SANCTIONED SUCH A DEPARTURE BY THE

DISTRICT COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This Court's most definitive commitment to the principle of the awarding of attorney fees to the successful civil rights' litigant was announced in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) when it was said that the prevailing party is actually a private attorney general acting for the public as a whole, who

> does so not for himself alone but also as a "private attorney general," vindicating a policy that *Congress considered of the highest priority*

[emphasis added]. This being a First Amendment case involving free speech, which this Court has reiterated as involving the "highest rung on the hierarchy of First Amendment values," *Connick v. Myers,* 461 U.S. (1983), it might be said, therefore, that the awarding of attorney fees to the prevailing party in a First Amendment case, as here, involves *the highest among the highest* of considerations.

> If successful plaintiffs were *routinely* forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees ... to encourage individuals ... to seek judicial relief....

Newman, 390 U.S. at 402 [emphasis added].

So, successful civil rights' litigants are not to *routinely* bear the expenses of attorney fees. A case which is not routine might not award fees, perhaps when the plaintiff prevails merely on some technicality or when the suit brought is

otherwise frivolous.[1]

The backdrop to these considerations is that this Court has rejected the computation of fees on a case-by-case basis here, as too time consuming and imprecise, leaving the matter to the lower courts, *In Re Berger,* 498 U.S. 233 (1991).

Here, the successful litigant not only prevailed, but enabled this Court to overturn a precedent that had stood for many years: that a "nominal" user fee was constitutional, *see e.g. Central Florida Nuclear Freeze Campaign v. Walsh,* 774 F.2d 1515 (11th Cir.1985) (approving nominality). Notably, Petitioner's hostility to *any* free speech user fees, including *nominal* ones, was not shared by opposing litigants below, nor by the trial court, nor by the court of appeals, even *en banc*, nor by those filing *amicus* briefs here, *see e.g. Brief for the American Federation of Labor and Congress of Industrial Organizations,* p. 25 (giving tacit approval to nominality doctrine). Such exceptional results seemingly would entitle Petitioner to additional fees, above and beyond routine attorney fees, under the enhancement tests set out in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974). Arguably, but for Petitioner and its success here, officials hostile to free speech might have been given to concoct innumerable schemes to thwart the First Amendment based on charges, fees, levies and taxes, akin to those of Forsyth County, Georgia, to the manifest detriment of the entire American People.

PROPOSITION II

THE COURT OF APPEALS, IN DENYING A

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[1] *Compare e.g. Young v. Kenley,* 465 F.Supp. 1260, 1260-63 (E.D.Va.1979) (frivolous lawsuit; attorney fees denied) *with NAACP v. Bell,* 448 F.Supp. 1164, 1166 (D.D.C.1978) (defendant voluntarily modified policy; plaintiff still entitled to fees).

PREVAILING CIVIL RIGHTS' LITIGANT ATTORNEY FEES, ABSENT A SHOWING OF "SPECIAL CIRCUMSTANCES" OR INJUSTICE, IS IN CONFLICT WITH OTHER COURTS OF APPEALS WHICH INTERPRET THE AWARDING OF SUCH FEES AS MANDATORY UNDER 42 USC §1988 ABSENT SUCH "SPECIAL CIRCUMSTANCES" OR INJUSTICE, GIVEN THIS COURT'S PUBLIC POLICY PRONOUNCEMENTS IN *NEWMAN V. PIGGIE PARK ENTERPRISES, INC.*, THE LEGISLATIVE HISTORY OF THE STATUTE AND PERTINENT CASE LAW.

Likely picking up on the *Newman* language, that awarding attorney fees should be largely routinely, courts of appeals state that prevailing civil rights' litigants should be *ordinarily entitled* to attorney fees, *Criterion Club of Albany v. Commissioners,* 594 F.2d 118, 120 (5th Cir. 1979) [emphasis added], absent some sort of special circumstances which would render such an award unjust. It has, also, been said by the Fifth Circuit that "special circumstances" must, indeed, be "special," *Robinson v. Kimbrough,* 652 F.2d 458, 467 (5th Cir. 1981). Notably, on the issue of awarding of attorney fees, no court below has ruled that such "special circumstances," if any, exist in order to deny fees or that any injustice will result from the awarding of such fees.

The legislative history of 42 USC §1988 belies a strong public policy commitment to the awarding of fees, detailing that the successful civil rights' plaintiff

> should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust

S.Rep.No. 94-1011, 94th Cong., 2d Sess. 4, reprinted in *U.S. Code Cong. & Admin. News* 5908, 5912 (1976). *Accord, Busche v. Burke,* 649 F.2d 509, 521 (7th Cir. 1981), *cert. denied* 454 U.S. 897 (1981) (holding that the court's discretion in

denying attorney fees is limited by the Act's legislative history).

> In several hearings held over the years, the Committee has found that *fee awards are essential* if the Federal statutes ... are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided ... in accordance with Congress' powers under, inter alia, the Fourteenth Amendment....

[emphasis added], *Attorney Fees Awards Act,* P.L. 94-559, *S.Rep. No. 94-1011,* 94th Cong., 2d Sess. 4, reprinted in *U.S. Code Cong. & Admin. News* 5908, 5912 (1976).

The intent of Congress is particularly pertinent insofar as it stresses that the awarding of attorney fees is more than simply an option, but, rather, more of an entitlement.

> *[F]ee awards ... are necessary* if citizens are to be able to effectively secure compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. *If the cost of private enforcement becomes too great, there will be no private enforcement.* If our civil rights are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases [emphasis added].

Attorney Fees Awards Act, P.L. 94-559, *S.Rep. No. 94-1011,* 94th Cong., 2d Sess. 4, reprinted in *U.S. Code Cong. & Admin. News* 5908, 5913 (1976).

PROPOSITION III

IT IS IMPORTANT FOR SAFEGUARDED FIRST AMENDMENT JURISPRUDENCE THAT SUBSTANTIVE LAW, PUBLIC POLICY CONSIDERATIONS AND CONSTITUTIONAL RIGHTS OUTWEIGH PROCEDURAL CONSIDERATIONS IN THE AWARDING OF ATTORNEY FEES TO THE SUCCESSFUL CIVIL RIGHTS' LITIGANT.

There are apparently only three cases in which this Court has dealt with the issue of awarding attorney fees in this Court. Two of those, *Norfolk & Western Rwy. Co. v. Roberson,* ___ U.S. ___, 112 S.Ct. 44 (1991) and *Reilly v. Delaney,* ___ U.S. ___, 111 S.Ct. 1616 (1991) were remanded to the court of appeals for "refiling" of the motion for attorney fees, likely indicating that the motions had been filed here and that this Court considered the filing to be proper in the appeals' court, instead. The motions were denied "without prejudice". The third case, *In Re Berger,* 498 U.S. 233 (1991) seems distinguishable in that this Court, in a rare move, appointed counsel here for an indigent in a capital case and, therefore, awarded attorney fees under the Criminal Justice Act of 1964, 18 USC §3006A(d)(2)(CJA) under Rule 39.6 of this Court.[2]

The question, then, seems to be: Is Petitioner to forfeit some $200,000.00 in attorney fees upon a procedural point? Because the motion for fees was filed here, instead of in the Court of Appeals?

It seems apparent that since Petitioner's motion for fees had been filed already in the Court of Appeals, before being filed here, it would have been granted (as it eventually was) but for

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[2] 42 USC §1988 was not involved. In fact, it appears that this Court has never specifically awarded fees here under that particular statute.

the Order denying fees, here.[3] [4]

Given the undergirding of the First Amendment which this case proposes and the necessity of fees being awarded as an adjunct of public policy in advancing constitutional rights, adding consideration gleaned from legislative history that the Fourteenth Amendment impacts, as well, in Congress' exercising of its power to secure compliance with the laws by enacting 42 USC §1988, it would seem that the instant matter, enmeshed, as it is, with constitutional rights, should weigh somewhat more heavily on the side of awarding fees if fees are being denied for procedural reasons, *cf. Vail v. Arizona,* 207 U.S. 201 (1970) (constitutional rights outweigh procedural matters).

There appears to be a conflict in the record on the issue of awarding of fees. On the one hand, the Court of Appeals, considering the record, ruled that fees should be awarded. Then, based upon the Order of this Court,[5] reversed itself. The record did not change. There still was no finding that awarding

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[3] The Court of Appeals actually shifted its position, but without comment. Did this Court intend to deny fees only for proceedings in this Court (such as briefing or oral argument)? Or retroactively for all fees? Or, did this Court intend that Petitioners, and others similarly situated, are to file their motions in the Court of Appeals? If so, is a forfeiture of fees of such magnitude in this case a just means of promulgating such a rule? Or, could this Court have entered its Order denying fees improvidently? What about fees for the proceedings following the Order, here, in the District Court and Court of Appeals relating to the issue of awarding fees against Respondent?

[4] It is said to be a general rule of the construction of motions and orders that when there are conflicts which are not readily susceptible to being harmonized, the construction should prevail which is just in all circumstances. 36 *Am.Jur.2d* Motions, Rules and Orders §29.

[5] Which apparently was not received by the Court of Appeals or the parties until many months after it was entered, see Order, Appendix p. 19.

of fees was unjust or that "special circumstances" prevented a fee award.[6]

Another issue may also intrude. The genesis of this case was in Petitioner's conducting of a parade and rally to protest the Martin Luther King Holiday. With no finding below, or here, that some "special circumstances" or injustice requires the denial of fees, given, also, that attorney fees are widely and routinely awarded to prevailing parties in other civil rights' suits, the "wavering trumpet" might appear to be sounding, to some, that a type of civil rights' litigation which favors a particular view has fees awarded "routinely" and "ordinarily" whereas those prevailing, but with another point of view, are denied such fees.

In addition, the signal to the Bar and to potential litigants might be seen as flashing amber, perhaps even red, instead of green, as it should be, to those pondering the expensive, and even awesome, task of challenging public officials who willy nilly trample upon the constitutional rights of American citizens.

CONCLUSION

This case offers the Court an opportunity to signal that there is no retreat from the private attorney general rationale which makes enforcement of constitutional rights something more than the "hollow pronouncement" Congress has denounced. The Court may, also, clarify the procedure for filing motions for

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[6] Noting the difficulty in ascertaining which court the fee motion should be filed in, Petitioner filed its Motion for Attorney Fees IV and for Stay in the District Court and Court of Appeals on August 12, 1992 requesting that the motion be received and acted upon

> by this or by the appropriate court ... until the U.S. Supreme Court or Appeals Court (or both, as the case may be) has ruled ... or given other guidance ... as is right in the premises.

attorney fees and the propriety, if at all, of granting such motions "routinely", selectively or not at all, such as by underscoring, if necessary, the need for a finding of record of reasons, if any, why fees should be denied. Furthermore, the settling any conflicts here between different Circuits on the limits, if any, of discretion in the awarding of attorney fees in significant civil rights' cases could be invaluable guidance to Bench, Bar and public alike.

For these and for all the reasons heretofore set forth, it is requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

Richard Barrett
Attorney for Petitioner
PO Box 2050
Learned MS 39154
(601) 885-2288

CERTIFICATE

THIS CERTIFIES that the undersigned has, this day, mailed, postage pre-paid, requisite, true copies of the foregoing Petition for Writ of Certiorari to Robert Stubbs III, Forsyth Professional Building, Cumming GA 30130.

THIS the 17th Day of February, 1994.

Richard Barrett

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8466
Non-Argument Calendar
D.C. Docket No. 2:91-cv-89-6

THE NATIONALIST MOVEMENT, a Mississippi non-profit corporation incorporated in Georgia,

Plaintiff-Appellant,

versus

CITY OF CUMMING,

Defendant,

FORSYTH COUNTY, GEORGIA,

Defendant-Appellee,

FORSYTH COUNTY BOARD OF EDUCATION,

Defendant.

Appeal from the United States District Court for the Northern District of Georgia

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(November 29, 1993)

Before ANDERSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1. "Costs taxed against plaintiff-appellant."

Entered: November 29, 1993
For the Court: Miguel J. Cortez, Clerk
By: Matt Davidson, Deputy Clerk

ISSUED AS MANDATE: Jan. 12, 1994

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

NATIONALIST MOVEMENT

VERSUS CIVIL NO. 2:89-cv-6-WCO

CITY OF CUMMING, GEORGIA, et al

ORDER

The captioned case is before the court on the plaintiff's motion for attorneys fees against Forsyth County and motion to stay ruling on that motion pending a ruling on similar motions by the Eleventh Circuit Court of Appeals and the United States Supreme Court, remand from the Eleventh Circuit Court of Appeals on the issue of a reasonable amount of attorneys fees, the plaintiff's motion for summary judgment against the City of Cumming, the City of Cumming's motion to strike the affidavit of attorney Richard Barrett filed in support of plaintiff's motion for summary judgment, the City of Cumming's motion for order on remand confirming the revocation of *pro hac vice* status for Richard Barrett, and Forsyth County's motion to strike the plaintiff's motion for attorneys fees filed in this court.

An evidentiary hearing was held in Gainesville on March 17, 1993, for the purpose of dealing with all matters currently before this court, including the awarding of attorneys fees. The court was fully prepared at that hearing to follow the dictates of the Eleventh Circuit in its orders of February 23, and March 16, 1993. At that hearing, the court denied the plaintiff's motion to

stay as being moot. The plaintiff withdrew its motion for summary judgment; accordingly, the City's motion to strike the Barrett affidavit is denied as moot.

The Nationalist Movement (the "Movement"), represented by attorney and CEO Richard Barrett, filed a complaint and request for a temporary restraining order on January 19, 1989, prohibiting the defendants Forsyth County (the "County"), City of Cumming (the "City"), and the Forsyth County Board of Education from interfering with the plaintiff's plans to hold a parade and rally in Cumming, Georgia, in protest of the Martin Luther King Jr. holiday. In its complaint, the Nationalist Movement challenged those portions of the City's parade ordinance prohibiting parades on Saturday mornings and allowing an application fee of up to $1,000 for a parade permit, as well as the City's condition that the Nationalist Movement would only be allowed to march on one lane of the street near the courthouse rather than on two lanes. Other claims and arguments were raised which are not material at this point.

At the TRO hearing on January 19, the court orally dismissed the City from the lawsuit. In its written order of January 23, 1989, the court also denied the plaintiff's motion as to the $1,000 application fee provision. The plaintiff appealed to the Eleventh Circuit, which reversed this court's ruling as to the County on the application fee issue. The Eleventh Circuit also held that the case should be remanded to this court for factual findings on two issues relating to the plaintiff's claims against the City. *Nationalist Movement v. City of Cumming,* 913 F.2d 885, 889-90 (11th Cir. 1990). The panel opinion was later vacated and rehearing en banc was granted. After the rehearing, the Eleventh Circuit en banc reinstated the panel opinion in its entirety. *Nationalist Movement v. City of Cumming,* 934 F.2d 1482 (11th Cir. 1991) (per curiam). The Supreme Court granted certiorari, and on June 19, 1992, it affirmed the holding of the Eleventh Circuit. *Forsyth County*

v. Nationalist Movement, 60 U.S.L.W. 4597 (1992).

MOTION FOR ATTORNEYS FEES

Following the Eleventh Circuit's ruling reversing the order of this court as to Forsyth County, *Nationalist Movement v. City of Cumming,* 913 F.2d 885 (11th Cir. 1990), the Movement filed a motion for attorneys fees in the Eleventh Circuit, covering all fees accrued in the proceedings before the district court and the court of appeals. After the Eleventh Circuit en banc reinstated the panel opinion in Nationalist Movement v. City of Cumming, 934 F.2d 1482 (11th Cir. 1991), the Movement filed a second motion for attorneys fees, "Motion for Attorneys Fees II," which covered fees accrued in the en banc proceedings before the Eleventh Circuit.

Following the Supreme Court's June 19, 1992, ruling affirming the Eleventh Circuit, the Movement filed a petition captioned "Motion for Attorney Fees III" in the Supreme Court. Defendant Forsyth County's Exhibit No. 1. In this motion, the Movement requested attorneys fees as the prevailing party against the County pursuant to 42 U.S.C. § 1988. The Movement attached to its "Motion for Attorneys Fees III" its two previous motions for attorneys fees which had been filed in the Eleventh Circuit, stating the following :

> . . . Respondent's Motion for Attorney Fees of October 19, 1990 and Motion for Attorney Fees II of July 11, 1991, filed in the Eleventh Circuit Court of Appeals, but not acted upon, are annexed hereto as Exhibits "B" and "C" respectively, and incorporated herein by reference, for disposition here.

Motion for Attorney Fees III, Defendant Forsyth County Exhibit 1, at 1. Thus, as the plaintiff flatly admitted in the hearing on March 17, 1993, and in its motions for fees filed in

this court[1] and in the Supreme Court, the Movement's motion for attorneys fees filed in the Supreme Court in June of 1992 incorporated requests for fees accrued at all three levels: the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the Northern District of Georgia. The plaintiff moved for a stay on any proceedings regarding attorneys fees in this court, thus further indicating its own understanding that rulings by the higher courts on the motions before them would be binding on this court.

Forsyth County's response to the Movement's Supreme Court motion for attorneys fees argued that (1) the Movement and its attorney, Richard Barrett, are essentially one and the same, and that therefore Barrett was effectively proceeding pro se and was not entitled to an award of attorneys fees under section 1988, pursuant to *Kay v. Ehrler,* 111 S. Ct. 1435 (1991);

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[1] The plaintiff's motion for attorneys fees filed in this court stated the following:

> 2. That on June 25, 1992, Plaintiff filed a Motion for Attorney Fees in the U.S. Supreme Court [*Forsyth County, Georgia v. The Nationalist Movement,* No. 91-538] in which fees were broken down into three categories:
>
> I. Motion for Attorney Fees: filed in the Court of Appeals on October 11, 1990 and covering attorney fees for the District Court and Court of Appeals through that date.
>
> II. Motion for Attorney Fees II: filed in the Court of Appeals on July 11, 1991 and covering attorney fees for that Court for the *en banc* proceedings through that date.
>
> III. Motion for Attorney Fees III: filed in the U.S. Supreme Court on June 25, 1992 and covering attorney fees for that Court through that date. An Addendum in Support of Motion for Attorney Fees III: filed in the U.S. Supreme Court on July 22, 1992 for post-hearing matters through that date.
>
> 3. That the instant motion covers and includes all motions and all fees for the District, Appeals' and Supreme Court to date.

Plaintiff's Motion for Attorney Fees IV and Stay, at 1-2.

belied by Barrett's performance throughout this litigation and at oral argument in the Supreme Court; and (3) the Movement's claims for attorneys fees at the district and court of appeals levels were excessive and inadequately supported. Defendant Forsyth County Exhibit No. 2. The County also attached to this response its responses to the Movement's two prior motions for attorneys fees in the Eleventh Circuit.

On October 5, 1992, the Supreme Court unanimously and summarily denied the Movement's Motion for Attorney Fees III, stating the following:

> The motion of petitioner [Forsyth County] to permit late filing of response to motion for attorneys fees is granted.
>
> The motion of respondent for attorney fees is denied.

Forsyth County v. Nationalist Movement, No. 91-538, 113 S. Ct. 40, 61 U.S.L.W. 3254 (Oct. 5, 1992).

Subsequent to this ruling by the Supreme Court, the Eleventh Circuit issued the following ruling on the Movement's motions for attorneys fees pending in its court:

> Appellant's motions for attorneys' fees, as to appellees' [sic] The City of Cumming and the Forsyth County Board of Education, is [sic] DENIED.
>
> Appellant's motions for attorneys' fees, as to appellee Forsyth County, Georgia, are GRANTED and this matter is REMANDED to the district court for the determination of a reasonable fee.

Nationalist Movement v. City of Cumming, et al., No. 89-8417

(11th Cir. Feb. 23, 1993).[2]

Upon receiving notice that this court had scheduled a hearing on all pending matters in this case, the County filed a motion in the Eleventh Circuit to vacate, reconsider or amend its order of February 23, 1993. Apparently unaware that the Supreme Court had already ruled on the Movement's Motion for Attorney Fees III in October of 1992, the County first requested a stay on any determination of the fee issue until the Supreme Court ruled on the motion before it. The County also informed the Eleventh Circuit of its desire to present evidence to this court regarding its contention that counsel for the Movement, Richard Barrett, was not entitled to attorneys fees at all because the Nationalist Movement was merely his "alter ego" and therefore Barrett was effectively proceeding pro se. Citing *Kay v. Ehrler,* 111 S. Ct. 1435 (1991). The County was concerned that the Eleventh Circuit's order, which simply granted the Movement's motions and remanded to determine the amount of the fee, could be interpreted to foreclose the County's opportunity to present evidence on this issue. The County therefore requested that the Eleventh Circuit amend its order of February 23 to specifically allow the district court to hear evidence on this issue. On March 16, the Eleventh Circuit

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[2] This court believes that in issuing this ruling, the Eleventh Circuit may not have been fully aware of the facts surrounding the Movement's various motions for attorneys fees. This court initially believed that the motion filed in the Supreme Court related only to fees accrued while the case was before the Supreme Court. It was not until later, at the hearing on March 17, that this court discovered through arguments of counsel, the Motion for Attorney Fees IV filed in this court, and Forsyth County's evidence regarding the Movement's Motion for Attorney Fees III, that the Supreme Court had before it a request for attorneys fees accrued at all levels of this litigation, including the district court and court of appeals. This court is of the opinion that, in allowing briefing on the issue of all attorneys fees and then in denying the Movement's motion in its entirety, the Supreme Court intended to put the entire issue to rest finally.

denied the County's requests:

> Appellee Forsyth County, Georgia's motion to vacate, reconsider or amend order of February 23, 1993, so as to maintain the stay of any determination on attorney's fees until the U.S. Supreme Court rules on appellant The Nationalist Movent's June 29, 1992 motion for attorney's fees, is DENIED.
>
> Appellee Forsyth County, Georgia's alternative motion to amend the February 23, 1993 order to specifically allow the district court to hear evidence on Forsyth County's "contentions regarding whether the Nationalist Movement is entitled to attorneys' fees at all pursuant to the U.S. Supreme Court's decision in *Kay v. Ehrler*, ___U.S.___, 11[1] S. Ct. 1435, ___ L. Ed. ___ (1991)" is DENIED.

Nationalist Movement v. City of Cumming, No. 89-8417 (11th Cir. Mar. 16, 1993).[3]

"The 'law of the case' doctrine invokes the rule that findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court . . . ." *Heathcoat v. Potts*, 905 F. 2d 367, 370 (11th Cir. 1990); *Dorsey v. Continental Cas. Co.*, 730 F. 2d 675, 678 (11th Cir. 1984); *United States v. Robinson*, 690 F. 2d 869, 872 (11th Cir. 1982).

> When acting under an appellate court's mandate, the law of the case dictates that a district court "cannot vary it, or examine it for any other purpose than execution; or

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[3] This court interprets this ruling to mean that, although the Eleventh Circuit would not specifically amend its order to allow the County to present evidence on this issue, it also did not specifically prohibit such presentation.

> give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."

Luckey v. Miller, 929 F. 2d 618, 621 (11th Cir. 1991) (quoting *Litman v. Massachusetts Mut. Life Ins. Co.,* 825 F.2d 1506, 1511 (11th Cir. 1987) (en banc), *cert. denied,* 484 U.S. 1006 (1988)).

This court now finds itself in the position of having to rule on the plaintiff's Motion of Attorney Fees IV, which expressly incorporates all fees accrued at all stages of this lawsuit, consistent with the law of this case as stated by two higher courts. The United States Supreme Court summarily denied the Movement's Motion for Attorney Fees III, which, as explained above, covered all fees accrued at all stages of the litigation, including the proceedings before the district court. The Eleventh Circuit subsequently granted the Movement's motions for attorneys fees as to the County, which motions included all fees accrued while the case was before the court of appeals and the district court, and remanded to this court for the determination of a reasonable fee. This court perceives a conflict between these two rulings.

The plaintiff argues that no precedential weight should be given to the Supreme Court's denial of attorneys fees, because counsel was unable to locate any cases in which the Supreme Court has granted a motion for attorneys fees, and because the question of fees is generally one that is remanded to lower courts for decision. However, the court has been able to locate at least one case in which the Supreme Court has granted a motion for attorneys fees. *In re Berger,* 498 U.S. 233 (1991) (awarding attorneys fees to attorney appointed by the Supreme Court has denied a motion for fees without prejudice to refiling in the court of appeals. *Norfolk & Western Rwy. Co. v.*

Roberson, 112 S. Ct. 44, 60 U.S.L.W. 3256 (1991) ("The motion of respondents for attorneys' fees is denied without prejudice to refiling in the United States Court of Appeals for the Fourth Circuit."); *Reilly v. Delaney,* 111 S. Ct. 1616, 59 U.S.L.W. 3723 (1991) ("The motion of respondents for attorneys' fees is denied without prejudice to refiling in the United States Court of Appeals for the Ninth Circuit.").

These rulings shed some light on the Court's summary denial of attorneys fees in this case. Clearly, the Supreme Court is capable of granting motions for fees or of denying motions for fees without prejudice if it wishes to do so. The fact that it chose not to do so in this case, when combined with its ruling in the same order allowing briefing on the issue, indicates to this court that The Supreme Court considered the arguments made by the County in its response to the Movement's motion for fees and, in light of those arguments, unanimously denied the Movement's motion for attorneys fees.

> The [law of the case] doctrine is based on the premise that an appellate decision is binding in all subsequent proceedings in the same case unless the presentation of new evidence or an intervening change in the controlling law dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice.

Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1510 (11th Cir. 1987) (en banc), *cert. denied,* 484 U.S. 1006 (1988).[4] as of the hearing on March 17, this court was fully

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[4] A trial court is normally bound by the rulings of the appellate court in the same case, except (1) when "substantially different evidence is produced at a subsequent trial," (2) when "controlling authority compels a contrary decision of law applicable to the issue," and (3) when the "prior decision was clearly erroneous and would work manifest injustice." *Dorsey,*

prepared to follow the directives of the Eleventh Circuit, even though the court felt that an issue was left open that required the presentation of evidence. However, as the facts surrounding the Movement's various motions for attorneys fees came to light during the hearing, the court became convinced that the situation was very different from what the Eleventh Circuit had probably understood to be the case when it issued its rulings.

Accordingly, given the evidence as it was developed at the hearing on March 17, the Supreme Court's ruling on the Movement's motion for attorneys fees (which incorporated the motions for fees filed in the Eleventh Circuit and included fees accrued at all stages of the litigation) constitutes "controlling authority" compelling a decision at variance with the rulings of the Eleventh Circuit. *Litman,* 825 F.2d at 1508 ("Absent a Supreme Court decision to the contrary, district courts are compelled to follow mandates of appellate court."). This court is bound under the law of the case doctrine by the ruling of the Supreme Court. Accordingly, the plaintiff's Motion for Attorney Fees IV, filed in this court on August 14, 1992, is denied.

CONCLUSION

At the hearing on March 17, 1993, the plaintiff withdrew its motion for summary judgment [39-1], and the City's motion to strike the affidavit of Richard Barrett [45-1] and the plaintiff's motion to stay [32-2] were denied as moot. The County's motion to strike the plaintiff's motion for attorneys fees [49-1] is denied. The plaintiff's motion for attorneys fee IV [33-1] is also denied. In view of the foregoing analysis, unless and until further direction is received from the Eleventh Circuit Court of Appeals, this court will not proceed any further on the issue of attorneys fees, either by the plaintiff's motion or on remand

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730 F.2d at 678 n.2.

from the Eleventh Circuit. The court defers ruling on the City's motion regarding Richard Barrett's *pro hac vice* status [44-1] at this time.

IT IS SO ORDERED this 24th day of March, 1993.

WILLIAM C. O'KELLEY
Chief United States District Judge